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The NLRB Modification of the Midwest Piping Doctrine: Industrial Stability v. Employee Free Choice

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I. Introduction

Congress enacted the National Labor Relations Act[1] to encourage industrial stability through the facilitation of collective bargaining.[2] The Act established the right of employees to self-organization as a cornerstone of national labor policy.[3] Moreover, the Act recognized that employer interference with employee attempts to organize[4] was a major cause of chronic labor unrest.[5] To discourage employers from engaging in obstructionist activity, section 8(a)(2) of the Act rendered it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[6]

The National Labor Relations Board[7] will find unlawful employer domination when a union has become subject to an employer's

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1. National Labor Relations Act (NLRA), Pub. L. No. 198, 49 Stat. 449 (1935),*codified as amended at* 29 U.S.C. §§ 151-168 (1976 & Supp. V 1981). The precursor to the NLRA, the National Industrial Recovery Act, 48 Stat. 198 (1933), was declared unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Supreme Court upheld the constitutionality of the NLRA, however, in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), citing Congress' power to regulate interstate commerce. The Court accepted the argument that governmental regulation of labor relations was necessary to alleviate industrial strife that interrupted the flow of interstate commerce. *See generally* CORTNER, THE WAGNER ACT CASES (1964). For a discussion of the events leading to the adoption of the Act, see Keyserling, *The Wagner Act: Its* Origin and Current Significance, 29 GEO. WASH. L. REV. 199 (1960).

2. *See generally* H. DAVEY, CONTEMPORARY COLLECTIVE BARGAINING (4th ed. 1982) (a discussion of the philosophy of encouraging collective bargaining embodied in the Act).

3. The National Labor Relations Act, 29 U.S.C. § 157 (1976) provides in part that

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

4. For an examination of the legislative policy, see S. REP. NO. 573, 74th Cong., 1st Sess. 1 (1935); H.R. REP. Nos. 969, 972, 74th Cong., 1st Sess. 6 (1935).

5. The Act's preamble states in pertinent part as follows: "The denial by *some* employers of the right of employees to organize . . . lead[s] to strikes and other forms of industrial strife . . . ." 29 U.S.C. § 151 (1976) (emphasis in original).

6. National Labor Relations Act, 29 U.S.C. § 158(a)(2) (1976).

7. Congress created an expert administrative agency, the National Labor Relations Board (the Board) to oversee the implementation of the Act. For a thorough examination of the origins of the Board, see J. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD (1974).

control.[8] Unlawful employer domination occurs most often when an employer has instigated the formation of a labor organization or when management employees actively participate in its administration.[9] The Board also has found section 8(a)(2) violations when an employer grants a union the use of company time and property.[10] The Board's rulings on employer recognition of rival unions, however, have spawned the most section 8(a)(2) litigation.[11]

In *Midwest Piping & Supply Co.*,[12] the Board sought to protect the right of employees to choose their collective bargaining representative free from employer interference by holding that an employer could not recognize[13] one of two or more rival unions when a "question concerning representation"[14] existed. The Board later extended the requirement of employer neutrality to the incumbent union[15] situation in *Shea Chemical Corp.*[16] and held that an employer must cease bargaining with an incumbent when a rival union files a representation petition.[17]

The ambiguity of the "question concerning representation" standard troubled the courts, however, and they frequently refused to enforce[18] Board decisions applying the *Midwest Piping* doctrine.

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8. In Spiegel Trucking Co., 225 N.L.R.B. 178 (1976), the Board listed several factors to be considered in determining whether an employer had exercised domination in violation of section 8(a)(2). They included: (1) the amount of control exerted by the employer over the membership of a union negotiating committee; (2) whether union by-laws provide for management control; and (3) whether supervisory employees are involved in union affairs. *Id.* at 179.

9. In NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir. 1971), the employer committed a Section 8(a)(2) violation by creating a union committee, overseeing the selection of its members, and presiding over its meetings.

10. In Coamo Knitting Mills, Inc., 150 N.L.R.B. 579, 582 (1964), the Board stated that "the use of company time and property does not, *per se*, establish unlawful support and assistance. Rather each case must be decided on the totality of its facts."

11. *See infra* notes 18, 52 and accompanying text.

12. 63 N.L.R.B. 1060 (1945).

13. A union may achieve representative status through three methods: (1) voluntary employer recognition; (2) certification through winning a Board-conducted election; and (3) issuance of a Board order to bargain following the finding of flagrant unfair labor practices against the employer. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The Act itself does not "require that the representative be designated by any particular procedure, as long as the representative is clearly the choice of a majority of the employees." N.L.R.B., THIRTY-SEVENTH ANNUAL REPORT 47 (1972).

14. *See infra* notes 51-68 and accompanying text.

15. An incumbent union is the current collective bargaining representative of the employees.

16. 121 N.L.R.B. 1027 (1958). Shea Chemical expressly permitted the incumbent union and the employer to observe an existing contract and to process grievances. *See infra* text accompanying note 139. In William D. Gibson Co., 110 N.L.R.B. 660 (1954), the Board initially refused to extend the *Midwest Piping* doctrine to the incumbent union situation. *See infra* note 106.

17. 121 N.L.R.B. at 1038.

18. *See, e.g.*, Buck Knives, Inc. v. NLRB, 223 N.L.R.B. 983 (1976), *enforcement denied*, 549 F.2d 1319 (9th Cir. 1977); Suburban Transit Corp. v. NLRB, 203 N.L.R.B. 465 (1973), *enforcement denied*, 499 F.2d 78 (3d Cir. 1974); NLRB v. Inter Island Resorts, 201 N.L.R.B. 139 (1973), *enforcement denied*, 507 F.2d 471 (9th Cir. 1974); Playskool, Inc. v. NLRB, 195 N.L.R.B. 560 (1972), *enforcement denied*, 477 F.2d 66 (7th Cir. 1973); American Bread Co. v. NLRB, 170 N.L.R.B. 85 (1968), *enforcement denied*, 411 F.2d 147 (6th Cir.

In 1982, the Board responded to the courts' criticism by re-examining[19] the *Midwest Piping* doctrine. The Board's *Bruckner*[20] decision modified the requirement of employer neutrality toward two or more rival nonincumbent unions in the initial stages of organization by stating that no question concerning representation could exist until a valid representation petition[21] had been filed.[22] In addition, a companion case to *Bruckner*, *RCA Del Caribe, Inc.*,[23] overruled *Shea Chemical* and held that an employer must continue to bargain with an incumbent union following the filing of a representation petition by a rival.[24]

The *Midwest Piping* doctrine rests on two important policies of the Act: encouraging Board-conducted elections as the "optimum vehicle for ascertaining employee preferences"[25] and ensuring that the employees' chosen bargaining agent is not unduly delayed in attaining representative status.[26] This comment examines the Board's rec-

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1969).

The Board has no power to enforce its unfair labor practice rulings. Section 10(e) of the Act, however, grants the Board authority to petition any circuit court for enforcement of its orders. 29 U.S.C. § 160(e) (1976). Therefore, the party found to have engaged in the unfair labor practice need take no action until the circuit court's resolution of the issue. Similarly, Board decisions can be appealed to the circuit courts.

19. One critic of the *Midwest Piping* decision and its progeny urged the Board to undertake a "long over-due re-evaluation of the doctrine" in 1964. Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292, 298 (1964) [hereinafter cited as *Need for Reappraisal*].

20. 262 N.L.R.B. 955 (1982). The employer in *Bruckner* recognized a union that produced authorization cards from approximately eighty-five percent of the bargaining unit employees and disregarded a warning from a rival union, also attempting to organize the employees, to refrain from such action. The rival union possessed only two authorization cards at the time of recognition. Neither union had filed a representation petition. The Board held that an employer faced with rival claims to representation by nonincumbent unions, in the absence of a representation petition, could recognize a union which represented an "uncoerced, unassisted" majority of his employees. *Id.* at 957.

The Board's holding represented a return to its initial interpretation of *Midwest Piping*. *See, e.g.*, Ensher, Alexander & Barsoom, Inc., 74 N.L.R.B. 1443 (1947) (requirement of employer neutrality conditioned on the filing of a representation petition).

21. The filing of a representation petition triggers a six-step inquiry by the Board. First, the Board determines whether its jurisdictional standards have been met. Second, the petition must be supported by at least thirty percent of the employees in the proposed bargaining unit. 29 U.S.C. § 159(e)(1) (1976). Third, any outstanding unfair labor practice charges against the employer must be addressed. Fourth, the Board must consider whether there is an existing contract that bars an election. *See infra* notes 141-44 and accompanying text. Fifth, a representation election cannot be conducted in the same bargaining unit more than once a year. 29 U.S.C. § 159(e)(2) (1976). Finally, the Board must find that the proposed bargaining unit is appropriate.

The question of appropriateness has arisen most frequently in the context of a group of skilled workers seeking to break away from a traditional plant-wide bargaining unit and form their own union. *See, e.g.*, Mallinckrodt Chem. Works, 162 N.L.R.B. 387 (1966). (Board shall not decide that a proposed craft unit is inappropriate on the ground that a different unit had been established by a prior Board determination.)

22. 262 N.L.R.B. at 957.

23. 262 N.L.R.B. at 962 (1982).

24. *Id.* at 965.

25. *Id.*

26. In *Bruckner*, the Board stated that a rival union should not "be permitted to fore-

onciliation in *Bruckner* of these two theoretically compatible principles that in practice often have conflicted due to an unreasonable interpretation[27] of *Midwest Piping*. This comment also demonstrates the manner in which *RCA Del Caribe* frustrates the Act's policy against employer interference with employees' right to self-organization by needlessly promulgating a rule that enhances the already formidable position of incumbent unions[28] while infringing upon the right of employees to choose their collective bargaining representative unfettered by employer interference.

II. The Requirement of Employer Neutrality Toward Rival Claims of Representation

A. Origins

In *Midwest Piping & Supply Co.*,[29] the United Steelworkers of America and the International Association of Steam and Gas Fitters engaged in a hotly-contested representation dispute. Both unions filed representation petitions,[30] but the employer recognized the Steamfitters when presented with authorization cards[31] signed by a majority of the employees. The Board held that the employer's recognition violated section 8(a)(2) and noted that, instead of awaiting the prescribed election process, the employer improperly had chosen "to arrogate to itself the resolution of the representation dispute against the steelworkers and in favor of the steamfitters."[32] The Board characterized the authorization cards relied on by the employer as inaccurate reflections of employee choice in a rival union context[33] and held that the employer interfered with the employees' right to choose their collective bargaining agent. The premature grant of recognition conferred upon the favored union unwarranted prestige and advantage.[34]

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stall an employer's recognition of another labor organization which represents an uncoerced majority of employees and thereby frustrate the establishment of a collective bargaining relationship." 262 N.L.R.B. at 957.

27. *See infra* note 52 and accompanying text.

28. *See infra* notes 138-40 and accompanying text.

29. 63 N.L.R.B. 1060 (1945).

30. *Id.* at 1065. *See supra* note 21.

31. A typical authorization card states that the signing employee endorses the specified union as his exclusive collective bargaining representative with respect to wages, hours, and other terms and conditions of employment. *See* R. LEWES & W. KRUPMAN, WINNING NLRB ELECTIONS 39 (2d ed. 1979).

32. 63 N.L.R.B. at 1070.

33. *Id.* at 1070 n.13. *See infra* notes 70-87 and accompanying text.

34. *Id.* at 1071.

B. Unwarranted Prestige and Advantage: The Core of the Employer Neutrality Requirement

1. The Coercive Effect of Recognition.—The *Midwest Piping* doctrine rests on the notion that a recognized union enjoys substantial benefits unavailable to its rivals.[35] A primary reason for congressional enactment of section 8(a)(2) was the legislative finding that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other."[36] The Supreme Court endorsed this view in *ILGWU v. NLRB (Bernhard-Altman Texas Corp.)*[37] and held that an employer commits an unfair labor practice by recognizing a union that does not have the support of a majority of the bargaining unit employees, even when that union subsequently obtains majority status.[38] The Court reasoned that premature recognition of a union was "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative."[39] The Court also noted that employer recognition imports to the favored union "a deceptive cloak of authority with which to persuasively elicit additional employee support."[40]

In many instances employees are influenced to support a union that has gained an employer's recognition.[41] The recognized union acquires legitimacy, setting it apart from its rivals. Moreover, a demonstrated ability to communicate effectively with the employer is

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35. The *Midwest Piping* doctrine has been explained as follows:

> The Board's theory must be that substantial prestige will accrue to the recognized union due to its position of authority in the plant. Union leaders will be dealing with management officials with respect to grievances and the negotiation of an agreement; from these dealings the union will acquire an aura of responsibility giving it a significant advantage over rivals in a forthcoming election.

Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavorial Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465, 1474 (1975) [hereinafter cited as *Behavioral Assumptions*].

36. NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267 (1938).

37. 366 U.S. 731 (1961).

38. *Id.* at 732. *See infra* notes 118-21 and accompanying text.

39. 366 U.S. at 736, *quoting* I.L.G.W.U. v. NLRB, 280 F.2d 616,621 (D.C. Cir. 1960).

40. *Id.*

41. The Board's decisions applying the *Midwest Piping* doctrine consistently rely on the assumption that employer recognition elevates the favored union's status among the rank and file. *See, e.g.*, NLRB v. Hudson Berlind Corp., 203 N.L.R.B. 421 (1973), *enforced*, 494 F.2d 1200 (2d Cir. 1974); NLRB v. Peter Paul, Inc., 185 N.L.R.B. 281 (1970), *enforcement denied*, 467 F.2d 700 (9th Cir. 1972); American Bread Co. v. NLRB, 170 N.L.R.B. 85 (1968), *enforcement denied*, 411 F.2d 147 (6th Cir. 1969); NLRB v. National Container Corp., 103 N.L.R.B. 1544 (1953), *enforced*, 211 F.2d 525 (2d Cir. 1954).

See also NLRB, TENTH ANNUAL REPORT 39 (1945); Comment *Midwest Piping Doctrine: Does it Support Employee Free Choice and Industrial Stability?*, 83 DICK. L. REV. 297 (1980) [hereinafter cited as *Employee Free Choice*]; *Need for Reappraisal*, *supra* note 19; Note, *The Employer's Duty of Neutrality in the Rival Union Situation*, 111 U. OF PA. L. REV. 930 (1963) [hereinafter cited as *Duty of Neutrality*].

a potent weapon in a contest for the allegiance of employees who may anticipate the advent of more harmonious labor relations if the recognized union subsequently is elected.[42] Most significantly, "employees realize that if the recognized union is elected, benefits already agreed to will be retained, whereas, should the rival union win, those benefits might be lost."[43] The employer's offer of concrete benefits during bargaining with the recognized union is likely to overcome assertions by a rival that it could achieve more favorable results.[44]

The *Midwest Piping* doctrine has been criticized as attaching too much significance to employer recognition.[45] One commentator has questioned what he perceives to be the Board's assumption that rank-and-file employees are not perspicacious enough to realize that a rival union may be able to represent their interests more effectively than the incumbent.[46] This argument misconstrues the rationale for requiring employer neutrality, however, because the *Midwest Piping* doctrine does not depend on a lack of employee sagacity.[47] Rather, *Midwest Piping* and the *Bruckner* modification rest on the assumption that employer recognition of and bargaining with one of two rival unions in the face of a representation petition will not be ignored by the employees. The act of the employer thus will impinge on the employees' freedom of choice in the subsequent election to some unknown degree, an undesirable result that is easily avoided by

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42. While the recognized union achieves instant credibility, "to the employees the unrecognized competitor is an unknown quantity whose election the employer had indicated it might not favor; with election of the recognized union, collective bargaining should proceed more smoothly with considerably less risk of strike and resultant loss of employee income." *Duty of Neutrality*, *supra* note 41, at 932.

43. *Id.* at 933.

44. One commentator has asserted that any undue advantage conferred upon a recognized union may be countered effectively by a rival's communications to the employees. *Need for Reappraisal*, *supra* note 19, at 309. It seems unwise, however, to place this burden on a rival union when the employer simply can be required to remain neutral following the filing of a representation petition.

45. One recent article stated that "[t]he Board's view that employer recognition attaches unwarranted prestige and impinges on employee freedom of choice is greatly overstated." *Employee Free Choice*, *supra* note 41, at 301.

46. Professor Getman has asserted, "Implicit in this theory . . . is the assumption that employee choice is made on a totally unsophisticated basis, and can be easily manipulated. I doubt the validity of this assumption." *Need for Reappraisal*, *supra* note 19, at 309.

47. Indeed, it can be argued that only an unsophisticated employee would fail to recognize that "mere words are not equal to a union contract." *Behavioral Assumptions*, *supra* note 35, at 1478. More than one Board doctrine is premised on the astuteness of employees. The Board has set aside elections due to employer misrepresentation on the assumption that employees are very attentive to all aspects of the representation campaign. *See, e.g.*, Hayes Stellite Co., 136 N.L.R.B. 95, *enforcement denied sub nom.* Union Carbide Corp. v. NLRB, 310 F.2d 844 (6th Cir. 1962); Saticoy Meat Packing Co., 182 N.L.R.B. 713 (1970); Winn Dixie Stores, Inc., 166 N.L.R.B. 227, 234 (1967); Graber Mfg. Co., 158 N.L.R.B. 244 (1966). While this assumption may be unwarranted, *see Behavorial Assumptions*, *supra* note 35, at 1471, it is highly probable that even employees who display relative indifference toward a representation campaign will note an employer's decision to recognize one of two or more competing unions.

the *Bruckner* rule.

2. Deleterious Effects of Employer Recognition.—Nonetheless, employer recognition in fact may affect a union adversely. Employees may perceive the recognized union as susceptible to employer domination and control and conclude that a rival union would pursue their interests more vigorously.[48] This consideration, rather than undercutting the *Midwest Piping* doctrine,[49] reinforces the need for maintaining some form of employer neutrality. Because employer recognition will benefit *one* union—either the recognized union[50] or its rival—the Act's policy of protecting employee freedom of choice is thwarted unless the filing of a valid representation petition triggers the requirement of employer neutrality.

III. The Standard: "A Question Concerning Representation"

A. The Board's Interpretation

Following the *Midwest Piping* decision, the Board consistently held that an employer could not recognize or bargain with any union when one of two or more rival unions had raised a question of representation.[51] The Board, however, proposed various definitions of that which constitutes a question of representation.[52] For example, in

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48. One commentator acknowledged this phenomenon by observing:

> [E]mployees are more likely to vote against a union thought to be favored by the employer on the assumption that it will not be aggressive enough in advancing their interests, than they are to vote in its favor because of any potential effectiveness in dealing with the employer. The term 'company union' still has strong pejorative connotations, and disdain for the 'teacher's pet' has deep roots in American society.

Need for Reappraisal, *supra* note 19, at 307.

49. Professor Getman justified his attack on the *Midwest Piping* doctrine by emphasizing the possible backlash against a union following employer recognition. *Id.*

50. *See supra* notes 34-44 and accompanying text.

51. The Board derived this phrase from section 9(c) of the Act, which provides in pertinent part that "whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected." 29 U.S.C. § 159(c) (1976).

52. In American Bread Co., 170 N.L.R.B. 85, *enforcement denied*, 411 F.2d 147 (6th Cir. 1969), the employer had recognized one of two competing unions on the basis of a card majority. The Board held that a real question concerning representation existed at the time of recognition because the employer had knowledge thatthe nonrecognized union's claim was not "unsupportable or specious." 170 N.L.R.B. at 86, *quoting* The Boy's Market, Inc., 156 N.L.R.B. 105, 107 (1965).

The Board exhibited rare skepticism toward a rival union's claim to representation in Robert Hall Gentilly Road Corp., 207 N.L.R.B. 692 (1973). Local 548 had obtained 33 authorization cards in a 155 employee bargaining unit but was forced to withdraw its representation petition when it could not muster additional support. The union did inform the employer that it still intended to engage in organizational activity. The employer subsequently recognized another union after a card check by a local clergyman revealed a seventy percent showing of support. *See supra* note 21.

The Board refused to find a section 8(a)(2) violation by the employer, noting that despite its claim, Local 548 actually had not engaged in any organizing activity following the withdrawal of its petition, and thus Local 548 had asserted "no more than a naked claim to a

Playskool, Inc. v. NLRB[53] the Furniture Workers' Union had lost a series of Board-conducted elections over a seventeen-year period.[54] Following a card check which showed that a rival union, the RWDSU, commanded the support of sixty percent of the employees, the employer granted the rival's request for recognition. The Board found that Playskool had committed a section 8(a)(2) violation and held that the Furniture Workers' showing of 29.9 percent support in a Board election conducted six months earlier and their continuing efforts to organize gave rise to a claim of representation that was "not . . . clearly unsupportable and lacking in substance."[55]

B. The Courts' Interpretation

The circuit courts of appeals, rather than initially considering the rival union's claim, focus on whether the recognized union has demonstrated its majority status to the employer. Such a showing precludes a genuine question of representation requiring employer neutrality.[56] Thus, the courts often refuse to enforce the Board's *Midwest Piping* orders, stating that the employer simply is complying with his obligation to deal with the collective bargaining representative of his employees' choice.[57] The courts, however, have acknowledged the wisdom of requiring an employer to remain aloof from valid competing claims to representation.[58]

The most important factor in the courts' reluctance to adopt the

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continuing interest in the employees." 207 N.L.R.B. at 693. The Board implied that an active, on-going organizational campaign was a minimum prerequisite for a valid claim to representation. *Id. See also* Newport Div. of Wintex Knitting Mill, 223 N.L.R.B. 1293 (1976). (No question exists where rival union makes no discernable attempt to organize employees.)

53. 195 N.L.R.B. 560 (1972), *enforcement denied*, 477 F.2d 66 (7th Cir. 1973).

54. *Id.*

55. *Id.* Applying the pre-*Bruckner/Midwest Piping* standard, the Board concluded that it was irrelevant that at the time the employer granted recognition, RWDSU enjoyed the support of a clear majority of the employees and the Furniture Workers had no hope of gaining the thirty percent support necessary to file a valid representation petition. *See supra* note 21.

56. The courts' position is best stated in Playskool, Inc. v. NLRB, 195 N.L.R.B. 560 (1972), *enforcement denied*, 477 F.2d 66 (7th Cir. 1973). The Seventh Circuit observed that the "[c]ourts . . . have accepted a majority showing by the victorious union as a means of terminating the instability inherent in a representation contest and preventing a minority union from frustrating the majority will in order to gain campaigning time." 477 F.2d at 70.

57. One court emphasized an employer's obligation to recognize the majority representative of his employees by noting:

> The Act does not require, however, that this neutrality continue until the last dissident voice is stilled . . . . Although the prize of recognition must not be employed coercively to influence the employees in making their decision, once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees.

NLRB v. Indianapolis Newspapers, Inc., 210 F.2d 501, 503-504 (7th Cir. 1954). The defect in the courts' position lies in the unreliability of the supposedly "indisputable" proof most frequently relied on by employers—authorization cards and secret employee polls. *See infra* notes 70-87 and accompanying text.

58. Playskool Inc. v. NLRB, 477 F.2d 66, 70 (7th Cir. 1973).

Board's interpretation of *Midwest Piping* is the possibility of an employer being prohibited from recognizing a union with a clear majority simply because another union has asserted a bogus claim.[59] A patent example of this scenario arose in *American Bread Co.*[60] Possessing only one authorization card, the Teamsters' union demanded recognition as the representative of the employer's 150 sales drivers. Following the employer's refusal to concede to this demand, the Bakery Workers' union claimed to represent a majority of the employees in a broad unit including the sales drivers. A card check supported this claim and the employer recognized the Bakery Workers. By this time the Teamsters had obtained a total of only eight authorization cards. Nevertheless, the Board held that the employer had violated section 8(a)(2)[61] because there was a real question of representation at the time of recognition.[62]

C. *The Bruckner Modification: A Successful Reconciliation*

The *Bruckner* requirement of a valid representation petition supported by thirty percent of a bargaining unit's employees[63] eliminates the possibility of an *American Bread* situation. At the same time, *Bruckner* ensures that employees will be free from employer interference when a bona fide question of representation exists.[64] *Bruckner* does not abandon the Board's traditional emphasis on the "question concerning representation" standard.[65] Rather, it redefines this standard to render it likely that the courts' focus on the presence or absence of a clear majority showing by the recognized union will coincide with the presence or absence of a rival representation peti-

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59. *Id.* at 69, n.2.

60. 170 N.L.R.B. 85 (1968), *enforcement denied*, 411 F.2d 147 (6th Cir. 1969). *See supra* note 52.

61. While the Board's reliance on *Midwest Piping* was not justified by the meager showing of support for the rival Teamsters union, the court's refusal to enforce the Board's order was based on an erroneous analysis. The court stated that "[t]he record does not indicate that the Company immediately recognized ABC *in order to* preclude dealing with the Teamsters." 411 F.2d at 155 (emphasis added). The effect of recognition, not the employer's intent, should trigger the application of *Midwest Piping*. See Sunbeam Corp., 99 N.L.R.B. 546 (1952). *See also infra* notes 118-124 and accompanying text.

62. The Sixth Circuit in *American Bread*, 411 F.2d 147 (1969), urged that the determination of whether a question of representation existed when an employer recognized one of two rival unions should be made on a case-by-case basis. Such an approach, while theoretically sound, is probably not feasible due to the confusion and disagreement over what standards the Board and the courts would apply. Furthermore, this confusion is eliminated by the *Bruckner* standard. *See infra* notes 67-69 and accompanying text.

63. *See supra* note 20 and accompanying text.

64. The Board justified its reliance on the representation petition as the critical event creating the necessity for strict employer neutrality by observing that "where a labor organization has filed a petition, both the Act and our administrative experience dictate the need for resolution of the representation issue through a Board election rather than through employer recognition." *Bruckner*, 262 N.L.R.B. 955 (1982).

65. *See supra* notes 51-55 and accompanying text.

tion.[66] *Bruckner* thus facilitates enforcement of the Board's *Midwest Piping* orders.

The Board's *Bruckner* modification eliminates confusion and uncertainty: employers and unions no longer will be required to speculate about the presence of a question of representation. After *Bruckner*, only a clear, identifiable event—the filing of a representation petition—creates the necessity for employer neutrality.[67]

The problems of confusion and uncertainty, however, are not alleviated by the courts' position that, notwithstanding the filing of a representation petition, no question of representation can exist if one union makes a showing sufficient to convince an employer that it has obtained majority support.[68] The bases of such a showing—authorization cards and secret employee polls—contain predictive flaws that make it difficult to determine if an employer's recognition is justified in a rival union situation.[69]

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66. In Pittsburgh Valve Co., 114 N.L.R.B. 193, *enforcement denied*, 234 F.2d 565 (4th Cir. 1956), the Board held that the filing of a petition was not necessary to raise a question concerning representation. The Fourth Circuit, in refusing to enforce the Board's order, specifically stated that an employer could recognize a majority union even if its rival had filed a representation petition. 234 F.2d at 570. *See also* NLRB v. Standard Steel Spring Co., 180 F.2d 942, 946 (6th Cir. 1956) in which the court stated as follows:

> The mere circumstance that there is pending an undisposed proceeding before the Board for the determination of the employees' choice of representative, based on a petition brought by one union, does not convict an employer of unfair labor practices for recognizing another union as the employees' representative on clear proof of such majority representation.

One court has suggested that a question concerning representation should be raised only when the Board *orders* a representation election. St. Louis Independent Packing Co. v. NLRB, 291 F.2d 700, 704 (7th Cir. 1961). Professor Getman criticized this standard in *Need for Reappraisal*, *supra* note 19, at 296 n.19, by comparing *St. Louis Independent Packing* with NLRB v. Swift & Co., 294 F.2d 285 (3d Cir. 1961). Swift was the employer in both instances and negotiated with each of the recognized unions, one located at its St. Louis plant and one located at its Harrisburg plant. The rival unions at both plants had filed representation petitions and made showings of thirty percent interest. In *St. Louis Independent Packing* the court enforced the Board's finding that Swift had violated section 8(a)(2) by contracting with the incumbent union; the court cited the Board's order of election. Enforcement was denied in *Swift*, however, on the ground that the Board had not ordered an election at the time of the signing of the incumbent's contract.

Bruckner eliminates the possibility of similarly inconsistent results by conditioning the requirement of employer neutrality on the filing of a representation petition, rather than on the Board's order of election.

67. *See Bruckner*, 262 N.L.R.B. 955 (1982). Member Jenkin's concurring opinion in *Bruckner* proposed a fifteen percent showing of support as the minimum requirement for a bona fide rival representational claim. *Id.* at 1378. This standard would place the burden on employers to determine whether a union has achieved the requisite fifteen percent support. Employer attempts to elicit information from employees regarding their organizational preferences, however, are discouraged by the Board as inherently coercive. *See infra* notes 90-94 and accompanying text. By conditioning the employer's requirement of neutrality upon the filing of a representation petition, the *Bruckner* majority simplifies the employer's task.

68. *See, e.g.*, Pittsburgh Valve Co. v. NLRB, 234 F.2d 565 (4th Cir. 1965); NLRB v. Indianapolis Newspapers, Inc., 210 F.2d 501 (7th Cir. 1954); NLRB v. Standard Steel Spring Co., 180 F.2d 942 (6th Cir. 1950).

69. *See infra* notes 70-94 and accompanying text.

IV. Alternatives To Board Conducted Elections

A. Authorization Cards

Both Congress and the courts consider authorization cards to be inherently suspect indicators of majority status,[70] particularly in the rival union context. Furthermore, the original formulation of the *Midwest Piping* doctrine rested primarily on the Board's distrust of authorization cards.[71] The Board was unimpressed with the employer's argument that the recognized union had proffered an authorization card majority and noted that:

> It is well known that membership cards obtained during the heat of rival organizing campaigns . . . do not necessarily reflect the ultimate choice of a bargaining representative; indeed, the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status which can best be resolved by a secret ballot among the employees.[72]

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70. The original version of the NLRA provided in section 9(c) that a bargaining agent could be certified by the Board after winning a secret poll of employees or by "any other suitable method." National Labor Relations Act, Act of July 5 (1935), c. 372, § 1, 49 Stat. 449 (codified at 29 U.S.C. § 151). Card checks frequently were employed by unions to obtain representative status until 1947, when the Taft-Hartley version of §9(c) omitted the phrase "or by any other suitable method."

The legislative debates concerning the Taft-Hartley amendments to the Act indicate a congressional skepticism toward authorization cards. Senator Taft remarked:

> Today an employer is faced with this situation. A man comes into his office and says, "I represent your employees. Sign this agreement or we strike tomorrow." Such instances have occurred all over the United States. The employer has no way in which to determine whether this man really does represent his employees or does not. The bill gives him the right to go to the Board under these circumstances and say "I want an election. I want to know who is the bargaining agent for my employees."

93 CONG. REC. 3838 (1947).

Furthermore, statistical studies confirm the unreliability of authorization cards. *See, e.g.*, Comment, *Refusal to Recognize Charges Under Section 8(a)(2) of the NLRB: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 387 (1960). One such study showed that out of 848 Board-conducted elections in which a union possessed a card majority, less than sixty percent of the "majority" unions won the subsequent election. Furthermore, a union which presented authorization cards signed by 100 percent of a bargaining unit's employees won the ensuing election only seventy-two percent of the time. Sandver, *The Validity of Union Authorization Cards as a Predictor of Success in NLRB Certification Elections*, 28 LABOR L.J. 696, 700-701 (1977).

One court has observed:

> It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check" unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks.

NLRB v. S.S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967). *See generally* WEXLEY & UHL, ORGANIZATIONAL BEHAVIOR AND PERSONAL PSYCHOLOGY (1977); Spindel, *Union Authorization Cards: A Reliable Basis for an NLRB Order to Bargain?*, 47 TEX. L. REV. 91 (1968).

71. For an analysis of the Board's historical attitude toward authorization cards, see Gruender and Prince, *Union Authorization Cards: Why Not Laboratory Conditions?*, 32 LAB. L. J. 13, 14-18 (1981).

72. Midwest Piping & Supply Co., 63 N.L.R.B. at 1070 n.13.

The wording of authorization cards[73] sometimes misleads workers who may fail to comprehend their meaning.[74] Employees frequently believe that they are merely endorsing a request for a representation election.[75] The Supreme Court in *NLRB v. Gissel Packing*[76] upheld the Board's position that authorization cards could be invalidated because the signers thought they were affirming their desire for an election. The cards could be rejected on this ground even when union solicitors had not indicated overtly that an election was the "sole" or "only" purpose of the cards.[77]

Moreover, as the Board noted in *Midwest Piping*, employees frequently sign the cards of more than one union.[78] For example, in *Intalco Aluminum Corp. v. NLRB*,[79] the employer recognized one of four competing unions, the Machinists, when presented with authorization cards signed by eighty-one of the employees in a 122 member bargaining unit. The Aluminum Workers subsequently filed a representation petition supported by forty-four authorization cards, thirty of which had been signed by employees who also had signed the Machinists' card. The Board adopted the Trial Examiner's finding that the plethora of duplicate signatures "would alone call for settling the question of representation by a secret election."[80]

Furthermore, both unions and employers may engage in coercive tactics designed to intimidate employees into signing authorization cards.[81] The case of *Distributive Workers of America v.*

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73. *See, e.g.*, Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1191 (1976); BISHOP, UNION AUTHORIZATION CARDS AND THE NLRB (1969); *See generally* J. GETMAN, S. GOLDBERG, AND J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976).

74. *See, e.g.*, Justak Bros. and Co. v. NLRB, 664 F.2d 1074 (7th Cir. 1981)(validity of authorization cards upheld despite allegations that non-English speaking employees did not understand the meaning of the cards).

75. In NLRB v. Randall P. Kane, Inc., 581 F.2d 215 (9th Cir. 1978), the court invalidated authorization cards because employees had been informed by union adherents that signing was merely an initial step in the election process. *See also* Tipton Electric Co. v. NLRB, 621 F.2d 890 (1980) (union members' testimony that they signed authorization card without reading it on the assurance that it would not commit them held to be insufficient to undermine the validity of card unambigiously authorizing union to act as signers' bargaining representative).

76. 419 U.S. 301 (1974).

77. The *Gissel* Court adopted the Board's position that

> [i]t is not the use or non-use of certain key or "magic" words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.

395 U.S. 575, 608 n.27 *quoting* Levi Strauss & Co., 172 N.L.R.B. 57, 60 n.7 (1968).

78. 63 N.L.R.B. at 1070 n.13. The Board in *Bruckner*, 262 N.L.R.B. at 958, also recognized this phenomenon by observing: "It is our experience that employees confronted by solicitations from rival unions will frequently sign authorization cards for more than one union. Dual cards reflect the competing organizational campaigns."

79. 417 F.2d 36 (9th Cir. 1969).

80. *Id.* at 39 n.8.

81. In NLRB v. Sanford Home For Adults, 669 F.2d 35 (2d Cir. 1981), the employer actively assisted union organizers in soliciting authorization cards. The employer also told one

NLRB[82] demonstrates the potential for blatant employer abuse of the authorization card process when two or more rival unions are engaged in a representation struggle. The incumbent union in *Distributive Workers*, Local 888, was ousted following a decertification election.[83] Local 888 and a rival, District 65, thereafter conducted intensive organizing campaigns. Both unions' requests for recognition on the basis of a purported authorization card majority were denied by the employer several months after the decertification election. Some employees, dissatisfied with the unions' slow progress, began consultations with a third union, Local 806. The employer permitted supervisors to solicit authorization cards for Local 806 on company time. Job applicants were told that signing a Local 806 card was a prerequisite to employment.[84] The employer swiftly approved Local 806's demand for recognition and neglected to count the proffered authorization cards. The District of Columbia Circuit Court of Appeals, in a rare enforcement of a *Midwest Piping* order,[85] upheld the Board's finding of a section 8(a)(2) violation.[86] The court noted that the employer's "blunt rejection of the demands of two unions and its precipitate recognition of a third hardly exemplifies the policy of strict neutrality required by the Act in situations where rival unions seek recognition."[87]

The *Bruckner* modification, which permits an employer to recognize a union on the basis of a card majority when no rival has filed a representation petition,[88] at first glance seems to depart from the Board's historical distrust of authorization cards. The probability that authorization cards do not reflect an actual majority, however, is lessened when a rival union cannot muster a thirty percent show-

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employee that "everyone had joined and that anyone else who had not signed would be 'thrown out.'" *Id.* at 36. The court upheld the Board's finding that the employer had coerced the employees into signing the cards to prevent them from joining a rival union.

82. 593 F.2d 1155 (D.C. Cir. 1978).

83. Both employers and employees may file decertification petitions with the Board. 29 U.S.C. § 159(c)(i) (1976). A valid decertification petition must be supported by thirty percent of the bargaining unit employees. *Id.* § 159(e). *See infra* note 151.

84. Supervisors also told regular employees that Local 806 already had been certified as their bargaining agent and that they would be discharged if they failed to sign the authorization card. 593 F.2d at 1159.

85. For other circuit court decisions enforcing the Board's decisions applying the *Midwest Piping* doctrine, see American Can Co. v. NLRB, 218 N.L.R.B. 102 (1975), *enforced*, 535 F.2d 180 (2d Cir. 1976); NLRB v. Hudson Berlind Corp., 203 N.L.R.B. 421 (1973), *enforced*, 494 F.2d 1200 (2d Cir. 1974); NLRB v. Western Commercial Transport, Inc., 201 N.L.R.B. 117 (1973), *enforced*, 487 F.2d 332 (5th Cir. 1973).

86. *Distributive Workers of America*, 593 F.2d at 1159.

87. *Id.* at 1160.

88. The validity of representation petitions may be questioned because they are often based on authorization cards. Authorization cards in this context, however, are utilized for a limited purpose—determining if sufficient support exists to warrant an election. It is an altogether different matter to rely on the validity of cards as a basis for employer recognition, an event that frequently prevents a fair election. *See supra* notes 70-85 and accompanying text.

ing of support.[89] *Bruckner*, therefore, prevents an employer from recognizing a union on the basis of a card majority when a bona fide rival claim exists. It also eliminates the time and expense of an election when the union presents the employer with impressive evidence that it commands the support of a majority of his employees.

B. Secret Employee Polls

Secret employee polls also have been suggested as an alternative to an election when an employer is confronted with rival representational claims.[90] Yet, secret polls, like authorization cards, are doubtful indicators of actual employee sentiment. Attempts by employers to determine employee views[91] may cause the employees to fear that a reply in favor of a specific union will result in retaliation by the employer.[92] The Board has approved the use of secret polls only when they are accompanied by stringent safeguards.[93] Moreover, the Board prohibits such polls when a representation petition is pending.[94]

The Supreme Court has affirmed the Board's consistent advocacy of an election as the preferred means for a union to obtain representative status. In *Linden Lumber Division, Summer & Co. v.*

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89. *Bruckner*, 262 N.L.R.B. at 958.

90. One commentator has stated: "The method used to determine the employees' choice of a bargaining representative is not significant . . . . Both secret polls and authorization cards are reliable substitutes for a Board-conducted election in all but the most extreme situations." *Employee Free Choice*, *supra* note 41, at 312.

91. In Blue Flash Express, 109 N.L.R.B. 591 (1954), the Board held that it was not an unfair labor practice for an employer to interrogate his employees regarding their organizational activities if the interrogation is motivated by a legitimate purpose, assurances against reprisal are given, and there are no independent unfair labor practices committed by the employer. *Id.* at 594. A strong dissent maintained that employees' rights to self-organize could be protected "only if they are free from employer prying and investigation. When an employer inquires into organizational activity whether by espionage, surveillance, polling, or direct questioning, he invades the privacy in which employees are entitled to exercise the right given them by the Act." *Id.* at 596 (Murdock and Peterson, Members, dissenting).

Despite *Blue Flash*, the Board has found that employer interrogation constitutes a violation of the Act in many circumstances. *See, e.g.*, NLRB v. Associated Naval Architects, 355 F.2d 788 (4th Cir. 1966); Clinton Foods, Inc., 237 N.L.R.B. 667 (1978); Montgomery Ward & Co., 115 N.L.R.B. 645 (1956).

92. The Board has observed as follows: "An employer cannot discriminate against union adherents without first ascertaining who they are." Cannon Electric Co., 151 N.L.R.B. 1465, 1468 (1965).

93. In Struksnes Construction Co., 165 N.L.R.B. 1062, 1064 (1967), the Board held that an employer was permitted to poll his employees as to their union sympathies only if (1) the employer's purpose is to determine the truth of the union's claim of majority; (2) the employer informs the employees of this purpose; (3) assurances against reprisal are given; (4) a secret ballot is used; and (5) the employer previously has not committed unfair labor practices or otherwise created a coercive atmosphere.

94. The Board upheld the employer's poll in *Struksnes* because it complied with the outlined safeguards, but stated that "a poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election." *Id.* at 1063.

NLRB,[95] the Court held that, in the absence of flagrant unfair labor practices, it was the employer's prerogative to refuse a demand for recognition on the basis of a card majority.[96] *Linden Lumber* thus allows the employer to force the union to seek a representation election.[97] *Bruckner* reflects the Supreme Court's skepticism toward other methods of obtaining representative status and recognizes that a Board-conducted election is the only reliable method of identifying the employee's choice of their representative once a representation petition has been filed.

V. The *Midwest Piping* Doctrine and Incumbent Unions

A. RCA Del Caribe, Inc.

In *RCA Del Caribe, Inc.*,[98] the Board overturned its longstanding requirement that an employer cease bargaining with an incumbent union when a rival files a representation petition.[99] After the employer's collective bargaining agreement with the incumbent union, IBEW, expired and intensive negotiations proved fruitless, the employees struck. Three weeks later, the rival Union Independiente filed a representation petition with the Board.[100] The employer then suspended negotiations with IBEW, but resumed negotiations a short time later when presented with cards, signed by 157 of the 227 bargaining unit employees, endorsing IBEW as their representative.[101] The employer and IBEW quickly agreed to a new collective bargaining agreement. Union Independiente subsequently charged the employer with a section 8(a)(2) violation.

The Board reaffirmed the *Midwest Piping* principle of affording

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95. 419 U.S. 301 (1974).

96. *Id.* at 310. *But cf.* NLRB v. Gissel Packing, 419 U.S. 301 (1974), in which the Supreme Court, while acknowledging the superiority of representation elections, permitted the Board to issue a bargaining order based on an authorization card majority when the employer had committed serious unfair labor practices with the purpose of undermining the union's majority status.

97. Since *Gissel*, however, the courts frequently have enforced the Board's bargaining orders issued on the basis of an authorization card majority when the employer had committed serious unfair labor practices rendering an election accurately reflecting the employees' free choice unlikely. *See, e.g.*, NLRB v. Permanent Label Corp., 657 F.2d 512, 519 (3d Cir. 1981). ("Board may properly consider unlawful conduct that occurred before the union demanded recognition in determining whether the employer's course of unlawful conduct was sufficiently pervasive to undermine the union's majority support and to make the possibility of a fair rerun election slight.") *See also* Tipton Elec. Co. v. NLRB, 621 F.2d 890 (8th Cir. 1980); Hambre Hombre Enterprises, v. NLRB, 581 F.2d 204 (9th Cir. 1978); NLRB v. Townhouse TV & Appliances, 531 F.2d 826 (7th Cir. 1976).

98. 262 N.L.R.B. No. 116, 110 L.R.R.M. 1369 (1982).

99. *See supra* note 15 and accompanying text.

100. Union Independiente's petition was still pending at the time of the *RCA Del Caribe* decision. 110 L.R.R.M. at 1369.

101. The parties stipulated that the signed authorization cards had been obtained without coercion. A petition signed by 157 of the bargaining unit employees was sent to the Board requesting that Union Independiente's representation petition be dismissed. *Id.* at 1369.

employees maximum latitude in choosing their representatives.[102] The Board observed, however, that "it has become increasingly evident that . . . efforts to promote employee free choice have been at a price to the stability of collective bargaining relationships."[103] According to the Board, the advantages enjoyed by an incumbent union[104] promote stability in labor relations. Moreover, the Board reasoned that the filing of a rival representation petition is insufficient to overcome the presumption of an incumbent union's continued majority status.[105] Therefore, the Board held that an employer's refusal to bargain with an incumbent union after a rival had filed a representation petition, which previously was mandated by *Shea Chemical*,[106] constituted a violation of section 8(a)(5).[107]

The Board reasoned that, during negotiations with an incumbent union, it was impossible for an employer to maintain absolute neutrality when confronted with a claim of representation by a ri-

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102. *Id.* at 1370.

103. *Id.*

104. *See infra* notes 138-140 and accompanying text.

105. The Board declared that "[w]hile the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not serve to strip [the incumbent union] of the advantages and authority it could otherwise legitimately claim." 110 L.R.R.M. at 1370.

106. 121 N.L.R.B. 1027 (1958). *Shea Chemical* overruled William D. Gibson Co., 110 N.L.R.B. 660 (1954), in which the Board refused to extend the *Midwest Piping* doctrine to an incumbent union situation. In *Gibson*, the incumbent Steel Workers Union began negotiating with the employer for a new collective bargaining agreement. The parties reached an accord on April 1, but did not sign due to their deferral of the wage question until "Big Steel" had signed new contracts. (The wages of Gibson's employees were to be equivalent to Big Steel employees.) Soon thereafter, the rival Machinists Union began attempts to organize Gibson's employees. On July 25, the Machinists filed a representation petition with the Board. Three days later, after the details of the Big Steel contracts were announced, the agreement between Gibson and the Steel Workers was finalized. The Board held that the employer did not commit a *Midwest Piping* violation. *Id.* at 663.

The *Gibson* decision thus can be explained at least in part by its peculiar facts. When the rival Machinists filed their petition, Gibson and the incumbent Steel Workers, for all intents and purposes, already had entered into a contract. Ordinarily, an existing contract of one to three years duration bars a rival's representation petition. *See infra* notes 141-145 and accompanying text.

107. Section 8(a)(5) provides in pertinent part as follows: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5) (1976).

The Board emphasized that the *RCA Del Caribe* holding did not preclude an employer from refusing to bargain with the incumbent "based on other objective considerations." 110 L.R.R.M. at 1371 n.13. An employer, however, may not refuse to bargain with a certified incumbent within one year after the date of certification, even if the union has lost its majority status through no fault of the employer. Brooks v. NLRB, 348 U.S. 96 (1954).The *Brooks* Court reasoned that either the workers or the employer could pursue the alternate remedy of petitioning the Board for a decertification election.

After the one-year period, the employer may withdraw recognition from the certified union only if he can produce evidence raising a serious doubt as to the union's majority status. Stoner Rubber Co., 123 N.L.R.B. 1440 (1959). *See also* Pioneer Flour Mills, 174 N.L.R.B. 1202 (1969), *enforced sub nom.*, C. H. Guenther & Son v. NLRB, 427 F.2d 983 (5th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970). The employer's serious doubt must arise in good faith on the basis of reasonable facts. *See* Automated Business Systems v. NLRB, 497 F.2d 262 (6th Cir. 1974); Daisy's Originals, Inc. v. NLRB, 468 F.2d 493 (5th Cir. 1972).

val.[108] Admittedly, employees may interpret an employer's decision to continue negotiations as an endorsement of the incumbent, but it was even more likely that the employees would view a termination of bargaining as a repudiation of the incumbent[109] and an endorsement of the rival. Thus, requiring the employer to bargain would assure that "in the ensuing election employees will no longer be presented with a distorted choice between an incumbent and a rival union artificially placed on an equal footing with the incumbent."[110]

B. An Unnecessary Infringement on Employee Free Choice

1. Intentional Employer Interference.—The *RCA Del Caribe* rationale is seriously flawed. An employer who bargains with an incumbent after a rival files a representation petition becomes intolerably intertwined with the process by which employees select their representative. The employer is able to influence his employees to accept a docile union by making concessions at critical times.[111] Conversely, an employer who is displeased with the incumbent can engage in bargaining tactics designed to undermine employee support.[112] In either case, the *RCA Del Caribe* holding "places the employer in a position to maneuver employee sentiments"[113]—a situation repugnant to the Act.[114]

2. Unintentional Sway.—*RCA Del Caribe* also facilitates unintentional employer interference with employee free choice. The Board's decision in *Sunbeam Corp.*[115] illustrates this problem. The employer in *Sunbeam* concluded a contract with one of four rival unions subject to the condition that the union produce an authorization card majority within one week. The Board held that the employer had committed a *Midwest Piping* violation and noted: "[T]hat the making of a contract with a union is the most potent

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108. RCA Del Caribe, Inc., 110 L.R.R.M. at 1370-71.

109. This aspect of the *RCA Del Caribe* rationale underestimates the perspicacity of employees. It is unlikely that workers would interpret a Board-mandated stance of absolute neutrality as a repudiation of the incumbent.

110. RCA Del Caribe, Inc., 110 L.R.R.M. at 1371. *See infra* notes 138-140 and accompanying text.

111. *Duty of Neutrality*, *supra* note 41, at 937. In Lenscraft Optical Corp., 128 N.L.R.B. 836 (1960), the employer strongly opposed the Teamsters, who filed a representation petition shortly after the expiration of the incumbent's collective bargaining agreement. To dissuade his employees from voting for the Teamsters, the employer concluded an agreement with the incumbent union in which he promised various employees wage increases, promotions and vacations if the incumbent won the election.

112. An employer in this situation can "frustrate all union bargaining attempts before the election through intransigence just short of bad faith in order to blacken the incumbent's bargaining record." *Duty of Neutrality*, *supra* note 41, at 937.

113. RCA Del Caribe, Inc., 110 L.R.R.M. at 1373 (Van DeWater, Chairman, dissenting).

114. *See supra* notes 36-49 and accompanying text.

115. 99 N.L.R.B. 546 (1952).

kind of support imaginable cannot be doubted."[116] The Board also declared:

> This is plainly a case for the application of the doctrine that an employer who undertakes to resolve the conflicting claims presented in such a situation by a necessarily inconclusive card check, and who concludes a contract on such a basis, has accorded "unwarranted prestige and advantage to one of two . . . competing labor organizations, and thereby prevented a free choice by the employees." *This would be true, regardless of the purity of the employer's motives, because of the effect of the conduct.*[117]

The Supreme Court has recognized that an employer's actions which influence employees' choice of a bargaining representative, regardless of the employer's motive, must be carefully scrutinized. The employer in *ILGWU v. NLRB (Bernhard-Altman Texas Corp.)*[118] committed a section 8(a)(2) violation by contributing support to a labor organization and a section 8(a)(1) violation by interfering with his employees' right to bargain collectively by recognizing in *good faith* a union that did not have the support of a majority of his employees.[119] The Court deemed the union's subsequent acquisition of a majority irrelevant.[120] The Court declared that an employer's recognition of a minority union (an event more likely to occur in the aftermath of *RCA Del Caribe*) constituted the clearest possible violation of employees' section 7 rights—the cornerstone of the Act.[121]

Regardless of the employer's purpose, collective bargaining with an incumbent that leads to an agreement favorable to the employees often will assure the incumbent of continued majority status.[122] Conversely, collective bargaining that results in an agreement with no gains for the employees, due to tough economic times rather than to incompetence on the part of the union or vindictiveness by the em-

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116. *Id.* at 550.

117. Id. at 552-553 (emphasis added). Although *Sunbeam Corp.* involved unions in the initial organizing stages, unintentional employer interference is just as likely to occur when an incumbent union is challenged by a rival representation petition. *See infra* notes 122-124 and accompanying text.

118. 366 U.S. 731 (1961).

119. *Id.* at 732, 733.

120. *Id.* at 736.

121. *Id.* at 737. *See also supra* note 3. The Court declared that to permit an employer to assert a defense of good faith "would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives." *Id.* at 738-39.

122. One commentator recognized the potent effect of a written contract by noting as follows: "[E]ven a relatively unimpressive contract signed with the incumbent after the rival asserts its claim will exert influence on employee free choice." *Duty of Neutrality, supra* note 31, at 937.

ployer, inevitably will produce strong anti-incumbent sentiment.[123] Only a rule that requires an employer to cease bargaining with an incumbent union when a rival has filed a representation petition can adequately protect employee free choice.[124]

3. Futility.—Bargaining with an incumbent following the filing of a rival representation petition frequently will be an exercise in futility.[125] The incumbent's bargaining leverage is undercut when the employer knows that a rival possesses a sizable amount of employee support. The employer will hesitate to bargain seriously, knowing that any agreement could be nullified[126] by a subsequent representation election. Moreover, a substantial number of employees may become disenchanted with an incumbent.

In *NLRB v. Air Master Corp.*,[127] an employer was confronted with evidence indicating that 230 of the 270 bargaining unit employees had repudiated the incumbent and now supported a rival. The employer thereupon recognized the rival and executed a collective bargaining agreement after verifying the authorization cards. The Third Circuit rejected the Board's finding of a section 8(a)(2) violation, noting that "[t]he moving spirits in this switch were not outsiders. No reason appeared to doubt that a change of affiliation had occurred or to believe that it had resulted from any illegal conduct."[128]

Although the Board cautioned in *Air Master* that its decision did not prohibit an employer from withdrawing recognition from an incumbent based on other objective considerations,[129] *RCA Del Caribe* nonetheless provides the employer in an *Air Master* situation with the temptation to conclude a hasty agreement with the incum-

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123. *Id.* Admittedly, employees may consider poor economic conditions when they evaluate a contract between an incumbent union and an employer made prior to a representation election. The contract negotiated by the employer, however, becomes the focal point in a representation contest required by the Act to be free from employer participation.

124. The potential for employer interference in the election process when the incumbent union faces a rival claim is demonstrated in NLRB v. Peter Paul, Inc., 185 N.L.R.B. 281 (1970), *enforcement denied*, 467 F.2d 700 (9th Cir. 1972). The employer in *Peter Paul*, who was about to begin negotiations on a new contract with an incumbent union, was asked to supply a payroll list so that the Board could determine the authenticity of a rival union's representation petition. The employer refused and continued negotiations with the incumbent. Following the execution of a contract, the rival filed a section 8(a)(2) unfair labor practice charge. The court refused to enforce the Board's order setting aside the contract and prohibiting the employer from continuing to recognize the incumbent, A strong dissent maintained that the court's failure to uphold the unfair labor practice charge "opens a way by which an employer can unilaterally frustrate those free democratic processes through which employees are supposed to be able to select their bargaining representative." *Id.* at 703.

125. RCA Del Caribe, Inc., 262 N.L.R.B. No. 116, 110 L.R.R.M. 1369, 1373 (1982).

126. The Supreme Court has observed that good faith bargaining is discouraged when the employer knows that "if he works conscientiously toward agreement, the rank-and-file may at the last moment repudiate their agent." Brooks v. NLRB, 348 U.S. 96 (1954).

127. 142 N.L.R.B. 181 (1963), *enforcement denied*, 339 F.2d 553 (3d Cir. 1964).

128. 339 F.2d at 555.

129. *See supra* note 107.

bent in an attempt to dissipate the strength of a militant rival.

4. Stability.—The *RCA Del Caribe* majority emphasized the importance of stability in labor relations.[130] Numerous decisions of the Board and the courts have identified stability as a major goal of the Act.[131] The Supreme Court, however, has discerned no threat to industrial stability in requiring an employer to forego recognition of a union and await a representation election. In *ILGWU v. NLRB (Bernhard-Altman Texas Corp.)*,[132] the Court supported its refusal to countenance good faith as a defense to a charge of recognizing a minority union by noting "[t]his conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the union. It merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative."[133]

The *RCA Del Caribe* majority also emphasized the delay inherent in prohibiting an employer from negotiating with an incumbent, noting again the unsettling effect on labor relations.[134] This argument is similarly flawed, however, for in *Linden Lumber Division, Summer & Co. v. NLRB*,[135] the Supreme Court found that the average time from the date a representation petition is filed until an election is conducted was only forty-five days.[136] By 1980, that figure had been reduced to thirty-eight days.[137] This de minimis delay has no adverse effect on industrial stability. Moreover, the Board could expedite the processing of representation petitions filed by rival unions challenging an incumbent.

The Board in *RCA Del Caribe* stated that prohibiting an employer from bargaining with an incumbent union when a rival has filed a representation petition artifically elevates the rival to the level of the incumbent.[138] This assertion is undercut by the advantages which the incumbent union enjoys regardless of employer recognition. The incumbent is highly visible and accessible to the employees by virtue of its status. Furthermore, *Shea Chemical* permits an em-

130. The Board maintained that "[b]ecause Midwest Piping focused on a legitimate concern for preserving the right of employees to change their bargaining representative, the Act's concern for stability in collective bargaining relationships embodied in the doctrine of the presumption of continuing majority status was not given its due." RCA Del Caribe, Inc., 262 N.L.R.B. No. 116, 110 L.R.R.M. 1369, 1370 (1982).

131. *See, e.g.*, United Supermarkets, 214 N.L.R.B. 958, 961 (1974). ("We have repeatedly emphasized that stabilization in industrial relations is the ultimate objective of all provisions in the Act.")

132. 366 U.S. 731 (1961).

133. *Id.* at 739.

134. RCA Del Caribe, Inc., 110 L.R.R.M. at 1371.

135. 419 U.S. 301 (1974).

136. *Id.* at 306-07.

137. NLRB, FORTY-FIFTH ANNUAL REPORT (1980).

138. RCA Del Caribe, Inc., 110 L.R.R.M. at 1370.

ployer to administer an existing contract and to process grievances with the incumbent union.[139] These advantages do not disappear merely because the employer suspends bargaining pursuant to a Board order.[140]

Conceivably, permitting an employer to bargain with an incumbent union when a rival has filed a representation petition will encourage greater stability among collective bargaining agents. The price necessary to achieve this stability, interference with employee free choice, however, is difficult to justify in light of other Board doctrines that enable an incumbent union to maintain a strong position in the contest for employee allegiance.

Such doctrines include the Board's contract-bar rules, which are designed to encourage industrial stability while at the same time providing employees an opportunity to exercise their right of free choice.[141] The essence of the current rule is that the existence of a contract of one to three years duration bars a rival representation petition[142] with one exception. A rival union may file timely a representation petition challenging an incumbent's majority status during the period from ninety days before the expiration of the incumbent's contract until sixty days prior to the expiration date. Thus, a thirty-day "window period" is created.[143] For example, if union A's contract with the employer expires September 1, rival union B may file a representation petition after September 1 or during a window period from June 1 to July 1. Assuming that no petition has been filed during the window period, collective bargaining between the employer and the incumbent union may proceed from July 1 to September 1 with no threat of a rival claim. This sixty-day bar furthers stability by providing an atmosphere favorable to the conclusion of a successful collective bargaining agreement with the incumbent.

The contract-bar rule prevents the *Shea Chemical* requirement of employer neutrality following the filing of a representation petition from permitting a rival union to ruin eleventh-hour negotiations

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139. Shea Chem. Corp., 121 N.L.R.B. 1027, 1029 (1958).

140. Professor Getman, in asserting that *Midwest Piping* should not be applied to incumbent unions, ironically undercuts the *RCA Del Caribe* majority's stability argument by acknowledging that "[w]here an incumbent union is involved, whatever aura of responsibility may otherwise attach to recognition has already been acquired through the previous history of representation. It cannot be erased by a short suspension of recognition." *Need for Reappraisal, supra* note 19, at 299.

141. In Crompton Co., 260 N.L.R.B. No. 169 (1982), the Board declared that in addition to promoting industrial stability, the contract-bar rules "provide a set opportunity for employees who are disenchanted with the performance of their collective bargaining representative to seek its removal."

142. General Cable Corp., 139 N.L.R.B. 1123 (1962) (extending the contract-bar period from two to three years).

143. The Board promulgated the window period rules in Leonard Wholesale Meats, Inc., 136 N.L.R.B. 1000 (1962).

between an incumbent and the employer.[144] If the rival has not filed a petition within the window period, the incumbent and the employer are free to negotiate until the contract expires. Alternatively, if the rival has filed a petition within the window period, an election can be conducted well before the expiration of the current agreement.[145]

Several other doctrines limit the frequency of representation elections in the interest of industrial stability. First, a valid representation election bars a subsequent election in the same bargaining unit for one year.[146] Second, an employer may not refuse to bargain with a certified incumbent union within one year after the certification, even if it is apparent that the union has lost its majority status through no fault of the employer.[147] Finally, an employer's voluntary grant of recognition to a majority union in the absence of competing claims bars rival representation petitions for a reasonable period.[148] These rules protect incumbent unions and favor industrial stability. *RCA Del Caribe* unnecessarily bolsters the status of incumbents while injecting employers into a representational process reserved by the Act to employees.[149]

VI. Recent Applications of the *Midwest Piping* Modification

Recently, the Board has decided several *Midwest Piping*-type cases that bring the ramifications of *Bruckner* and *RCA Del Caribe* into focus. In *Signal Transformer*,[150] the employees struck after bargaining between the employer and the incumbent union, IUE, reached an impasse. The employees became dissatisfied with the conduct of the strike and voted to oust IUE as their representative.[151] The Teamsters began organizational activity and shortly thereafter

144. In Crompton Co., 260 N.L.R.B. No. 169 (1982), the Board reasoned that the contract-bar rules "further industrial peace and stability by providing the parties with a period just before the expiration of the contract during which they can negotiate a new agreement free from . . . disruption."

145. *See supra* note 137 and accompanying text.

146. National Labor Relations Act, 20 U.S.C. § 159(c) (1976).

147. *See supra* note 107.

148. Keller Plastics Eastern, Inc., 157 N.L.R.B. 583 (1966). For a discussion of what constitutes a reasonable period of time, see Brennan's Cadillac, Inc., 231 N.L.R.B. 285 (1977).

149. *See supra* note 6 and accompanying text.

150. 265 N.L.R.B. No. 33 (1982).

151. No decertification petition was filed in *Signal*. In Dresser Industries, 264 N.L.R.B. No. 145, 111 L.R.R.M. 1436 (1982), however, the Board extended the *RCA Del Caribe* rationale to the filing of a decertification petition. The Board held that a decertification petition did not relieve an employer of his obligation to bargain with an incumbent union.

Chairman Van de Water's dissent echoed his concern in *RCA Del Caribe* that the freedom of employees to choose their representative without employer interference was being eroded. He stated that "[t]he NLRA was enacted in the public interest for the protection of employees' right to choose freely whether to be represented—or to be unrepresented—by a union. Today, the majority completes its abandonment of a long-established principle designed to preserve that right." 111 L.R.R.M. at 1438.

filed a representation petition supported by 73 authorization cards out of the 121 bargaining unit employees. Picketing continued until ten days later when Signal recognized the Teamsters, relying on the authorization cards and the fact that IUE pickets had been replaced by Teamsters pickets. The parties quickly concluded a collective bargaining agreement, and the strike ended.

The Board held that Signal had committed a *Midwest Piping* violation by recognizing the Teamsters when IUE had not given up its claim to representation. The Board did not hold, however, that Signal had failed to comply with its *RCA Del Caribe* obligation to bargain with an incumbent union when a rival had filed a representation petition. Because Signal acted not merely on the basis of a rival representation petition but on "other objective considerations,"[152] it came within the *RCA Del Caribe* proviso and properly withdrew recognition from IUE. The authorization cards and the cessation of IUE picketing entitled Signal to withdraw recognition because of a good faith doubt.[153]

Rather, the Board's finding that section 8(a)(2) had been violated was based on *Bruckner*.[154] Once recognition was withdrawn from IUE, no incumbent union was present. Signal recognized the Teamsters when the Teamsters' representation petition was before the Board. Because IUE had not given up its claim of representation, Signal committed a *Bruckner* violation by recognizing one of two rival unions during the pendency of a representation petition.[155]

Thus, application of *Bruckner* results in the curious situation in which a union is actually penalized for filing a representation petition. If the Teamsters had not filed the petition, no question of representation would have existed and Signal's recognition based on the card majority would have been valid. This scenario, however, is unlikely to be repeated. The events in *Signal* occurred before the *Bruckner* decision.[156] In the aftermath of *Bruckner*, a union faced with no significant opposition that seeks to obtain voluntary employer recognition will refrain from filing a representation petition until the employer has denied the recognition request.

Another post-*RCA Del Caribe* decision involved a misstatement by the employer of the requirement for employer neutrality. In *Richmond Waterfront Terminals, Inc.*,[157] the Board dismissed the rival union's representation petition challenging the incumbent after it

152. *See supra* note 107.
153. *Id.*
154. *See supra* notes 20-22 and accompanying text.
155. The Board in *Signal* thus interpreted the *Bruckner* ban on recognition to cover even the recognized union's filing of a representation petition. 265 N.L.R.B. 33.
156. *RCA Del Caribe* and *Bruckner* thus are applied retroactively.
157. 265 N.L.R.B. No. 175 (1982).

found the rival lacking the support of thirty percent of the bargaining unit employees. The rival requested a review of the dismissal, but one day later the employer concluded an agreement with the incumbent. Two months later the petition was reinstated by the Board, and an election was ordered. Several days before the election, the employer informed his employees that the Board's action left it no choice but to refuse to enforce the new contract and to revert to the previous year's wage scale. The Board held that the employer's abrupt rescission of the contract constituted objectionable conduct and ordered a new election.[158]

The employer's action in *Richmond* apparently was based, at least in part, on a misunderstanding of *Shea Chemical*.[159] *Shea* expressly permitted an employer to enforce an existing contract with an incumbent in the face of a rival representation petition.[160] No representation petition was pending when the employer executed the contract in *Richmond*; therefore, the contract was valid, and the employer's subsequent rescission would have justified setting aside the election under *Shea* as well as under *RCA Del Caribe*.

Thus, the requirement of employer neutrality toward an incumbent union subject to a bona fide challenge does not permit an employer to engage in dramatic tactics designed to manipulate employee preferences. Rather, the requirement protects the right of employees to select their collective bargaining representative without the distraction of an employer bargaining with one of the contestants in the battle for their allegiance. *RCA Del Caribe* emasculates this right.

VII. Conclusion

Employer attempts to interfere with the selection of employees' bargaining representatives are prohibited by the National Labor Relations Act.[161] The National Labor Relations Board formulated the *Midwest Piping* doctrine to prevent employers from becoming intimately involved with their employees' decision to align themselves with one of two or more rival unions. The *Bruckner* modification of *Midwest Piping* provides employers with a clear standard—the filing of a representation petition—that triggers the requirement of neutrality toward rival unions in the initial organizing stages. Employers no longer will be required to withhold recognition from a union that enjoys the support of an undisputed majority of employees merely

158. *See supra* note 47 and accompanying text.

159. 121 N.L.R.B. 1027 (1958). The events in *Richmond* occurred before the *Midwest Piping* modifications. Therefore, the employer must have based his actions on *Shea Chemical*.

160. *See supra* note 139 and accompanying text.

161. *See supra* notes 1-6 and accompanying text.

because another union has asserted an obviously hopeless claim.[162] Most importantly, employers will be required to await the outcome of a Board-conducted election, the most reliable method of ascertaining employee choice,[163] when a genuine contest to represent their employees exists.

RCA Del Caribe, however, severely erodes the right of employees to choose their collective bargaining representatives free from employer influence. After *RCA Del Caribe*, the employer's actions will be of critical importance in a representation contest between an incumbent union and a formidable challenger. By requiring an employer to bargain with an incumbent union in the face of a rival representation petition, the Board exalts the goal of industrial stability at the expense of the ultimate aim of the Act, employee freedom of choice.

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162. *See supra* notes 60-62 and accompanying text.
163. *See supra* notes 70-97 and accompanying text.